MOTION FILED
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No. 88-220

In The
Supreme Court of the United States
October Term, 1988

CHERYL ANN VIELLE,
Petitioner,

v.

WILLIAM JOSEPH BAISLEY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

MOTION OF BLACKFEET TRIBE FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER AND BRIEF AMICUS CURIAE

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MOTION OF BLACKFEET TRIBE FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

The Blackfeet Tribe of the Blackfeet Reservation in Montana respectfully moves this Court for leave to file an amicus curiae brief in support of the Petition for Certiorari filed in this case on August 8, 1988. Petitioner has consented to the filing of an amicus brief by the Blackfeet Tribe, and the letter of consent has been lodged with the Court. The Respondent has denied consent.

The Blackfeet Tribe of the Blackfeet Indian Reservation is a federally recognized tribe organized under the Indian Reorganization Act of June 18, 1934, 48 Stat. 986. The Blackfeet Tribal Business Council is the governing body of the Blackfeet Reservation, and is responsible for, among other things, representing, developing and protecting the interests of its members.

This case involves three issues of vital importance to the Blackfeet Tribe: the well-being and continuing security of two tribal member children; the integrity of the jurisdiction and authority of the Blackfeet Tribal Courts; and the integrity of tribal law. Each of these issues can be adequately addressed only by the Blackfeet Tribe.

The custody dispute at issue involves three tribal members, the two minor children and their mother, Cheryl Ann Vielle. The children and their mother are duly enrolled members of the Tribe, having met all membership criteria established by the Blackfeet Constitution. Child custody placement of member children is of utmost concern to the Blackfeet Tribe, and the Tribe has an interest

independent from the Petitioner and Respondent to insure that placement of tribal member children is appropriate.

In addition, the jurisdiction and authority of the Blackfeet Tribal Courts to determine the custody of member children is directly raised in this case. The Blackfeet Tribe has a vital interest in ensuring that its Tribal Courts are given the respect and deference by state courts required by law and principles of comity. Both comity and the specific provisions of the Uniform Child Custody and Jurisdiction Act as adopted by Colorado, *see* C.R.S. 14-13-101 *et seq.*, require that the Tribal Court be given proper consideration in determinations concerning the appropriate forum to make custody decisions involving tribal member children.

Finally, the Blackfeet Tribe has a strong interest in ensuring that its tribal laws are applied and interpreted correctly. Blackfeet Tribal laws have been raised in and interpreted by the Colorado courts, but the courts have looked to the wrong law. The integrity of tribal law has been put at issue because the Colorado courts did not attempt to identify the correct tribal law, nor did they defer to tribal court for the correct interpretation of the law.

Based on the above interests, the Blackfeet Tribe requests that its Motion for Leave to file an amicus brief in support of the Petition for Certiorari be granted.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE BLACKFEET TRIBE

The interests of the Blackfeet Tribe are set forth in the foregoing Motion for Leave to File Brief Amicus Curiae in Support of Petitioner and are incorporated herein by reference.

STATUTES INVOLVED

In addition to the statutes set out in the Petition for Certiorari at 4-8, the following statutes are also relevant.

BLACKFEET TRIBAL LAW AND ORDER CODE—PREFACE:

> The Blackfeet Tribal Law and Order Code of 1967, as amended is a Code written by the Blackfeet Tribe to be administered within the exterior boundaries of the Blackfeet Reservation of Montana, and under no condition does the State of Montana have jurisdiction over this Code, and further that any portion now in the Blackfeet Tribal Law and Order Code of 1967, as amended relating to concurrent jurisdiction with said State of Montana or giving any jurisdiction to the said State of Montana, be hereby deleted and such language shall be of no further force or effect.
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> (Adopted by Ordinance No. 44, Blackfeet Tribe, December 13, 1974).

C.R.S. 14-13-107. SIMULTANEOUS PROCEEDINGS IN OTHER STATES:

> (1) A court of this state shall not exercise its jurisdiction under this article if at the time of filing the petition a proceeding concerning the custody of the

child was pending in a court of another state exercising jurisdiction substantially in conformity with this article, unless the proceeding is stayed by the court of the other state because this state is a more appropriate forum or for other reasons.

(2) Before hearing the petition in a custody proceeding, the court shall examine the pleadings and other information supplied by the parties under section 14-13-110 and shall consult the child custody registry under section 14-13-117 concerning the pendency of proceedings with respect to the child in other states. If the court has reason to believe that proceedings may be pending in another state, it shall direct an inquiry to the state court administrator or other appropriate official of the other state.

(3) If the court is informed during the course of the proceeding that a proceeding concerning the custody of the child was pending in another state before the court assumed jurisdiction, it shall stay the proceeding and communicate with the court in which the other proceeding is pending, to the end that the issue may be litigated in the more appropriate forum and that information may be exchanged in accordance with sections 14-13-120 to 14-13-123. If a court of this state has made a custody decree before being informed of a pending proceeding in a court of another state, it shall immediately inform that court of the fact. If the court is informed that a proceeding was commenced in another state after it assumed jurisdiction, it shall likewise inform the other court, to the end that the issues may be litigated in the more appropriate forum.

C.R.S. 14-13-108. INCONVENIENT FORUM:

(1) A court which has jurisdiction under this article to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.

SUMMARY OF ARGUMENT

Certiorari should be granted in this case in order to determine and clarify the status of Indian tribes and tribal courts under the Uniform Child Custody and Jurisdiction Act (hereinafter UCCJA) in child custody disputes in state courts involving tribal members and tribal member children. Tribes and tribal courts ought to be treated as states under the UCCJA for determining jurisdictional disputes between tribal courts and state courts in such cases. Where tribal members are involved, tribal courts have jurisdiction to determine custody matters. Tribes have interests at least equal to, if not greater than, states in insuring that child custody matters involving tribal member children are determined in the most appropriate forum, and that cooperation is maximized and competition is minimized between tribes and states exercising jurisdiction in such matters.

In this case, the Blackfeet Tribal Court was not treated as an entity having authority to decide a custody dispute involving tribal member children in part because the Colorado Court of Appeals determined that tribal law had conferred jurisdiction on the Montana courts. However, the Colorado court relied on a tribal law which is no longer effective and which was specifically amended in 1974 to make clear that no jurisdiction was conferred on state courts. *See* Preface to Blackfeet Law and Order Code, reprinted *supra* at 6. In addition, the Colorado court erred by not deferring to the Tribal Court for interpretation of its own law and its own jurisdiction.

REASONS FOR GRANTING THE WRIT

THE JURISDICTIONAL ISSUES IN THIS CUSTODY ACTION AS BETWEEN TRIBAL COURT AND THE COURT OF ANOTHER STATE ARE SUBSTANTIAL AND IMPORTANT.

1. This Case Raises a Novel and Important Issue As to the Applicability of the UCCJA Where Tribal Courts Are Involved.

In this case, three different courts potentially have jurisdiction over the custody of the children involved—the Colorado court, the Montana court and the Blackfeet Tribal Court. Under the UCCJA, the Colorado court determined the more appropriate forum as between the Colorado and Montana courts, but it failed to determine the more appropriate forum as between the Colorado and Blackfeet Tribal courts.

The UCCJA was adopted by Colorado in 1963. *See* C.R.S. 14-13-101 *et seq.* The stated purpose of the Act, among others, is to:

> (a) Avoid jurisdictional competition and conflict with courts of other states . . . ; (b) Promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child; (c) Assure that litigation concerning the custody of a child takes place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training and personal relationships is most readily available. . . .

C.R.S. 14-13-102(a) - (c). Even if the Colorado court has jurisdiction, it is not required to exercise it if the purposes of the Act would be furthered by refraining from

the exercise of its jurisdiction. *In re Nicholson,* 648 P.2d 681 (Colo. App. 1982). Specifically, a Colorado court may decline to exercise its jurisdiction if it finds it is an "inconvenient forum" and that a court of another state is a "more appropriate forum." C.R.S. 14-13-108, reprinted *supra* at 7.

In addition, the Colorado court is required to contact the court of another state if there is reason to believe proceedings may be pending in that state, C.R.S. 14-13-107(2), or "[i]f the court is informed that a proceeding was commenced in another state after it assumed jurisdiction, it shall likewise inform the other court, to the end that the issues may be litigated in the more appropriate forum," C.R.S. 14-13-107(3), both reprinted *supra* at 7.

The issue of whether an Indian Tribe and its tribal court are to be treated like a state under the UCCJA has not been widely litigated. However, courts in both Arizona and Montana have determined that the UCCJA applies to jurisdictional conflicts in child custody matters between a state and a tribe. In *Martinez v. Superior Court, La Pa County,* 731 P.2d 1244, 1247 (Ariz. App. 1987), the Arizona court held that "Indian reservations are territories or possessions of the United States as used in the Uniform Child Custody Jurisdiction Act. . . ." *Id.* The court determined that the Act was applicable at least as to those provisions that do not require reciprocity, even though the Tribe involved had not adopted the Act. *Id.* at 1248. The court therefore applied the Act and determined that the state court was an inconvenient forum, that the tribal court was a more appropriate forum, and on remand directed the lower court to decline to exercise its jurisdiction.

Similarly, in *In re Custody of Zier,* 750 P.2d 1083 (Mont. 1988), the Montana Supreme Court applied the Montana UCCJA to determine the more appropriate forum as between the State court and the Crow Tribal Court in a child custody case. The lower court's determination that the tribal court was the more appropriate forum was affirmed by the Supreme Court.[1]

This Court should confirm the application of the UCCJA to jurisdictional conflicts involving states and tribes based on the above cases and the purposes and intent of the UCCJA. On remand, the Colorado court should be directed to make a determination of the more appropriate forum under the UCCJA as between the Colorado court and the Blackfeet Tribal Court. Here, the Blackfeet Tribe has jurisdiction over the custody issue, *see* Part 2 *infra,* and has in fact exercised its jurisdiction. *See* Emergency Protection Order issued by the Blackfeet Tribal Court on July 15, 1986, Appendix C to the Petition.

In the proceedings below, the Petitioner repeatedly argued that the Blackfeet Tribal Court was, and is, the more appropriate forum to determine custody of the tribal member children, and that the Colorado court erred in not conferring with the Tribal Court. Even when the Colorado court became aware that the Tribal Court had issued the Emergency Protective Order on July 15, 1986,

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[1] The facts of the *Zier* case are very similar to the facts in the present case. *See* Statement of Facts in Petition for Certiorari. In *Zier,* the father moved with the children away from the Reservation. The mother had been a student attending school away from the Reservation, but her residence was the Reservation. The grandparents lived on the Reservation. Proceedings were begun in tribal court but had not been concluded at the time of the state court action.

it neglected to contact the Tribal Court as required by C.R.S. 14-13-107(2) or C.R.S. 14-13-107(3) "to the end that the issues may be litigated in the more appropriate forum." *Id.*[2]

The Emergency Protective Order of the Tribal Court granted custody of the minor children to Petitioner "pending litigation of the issue of which forum is more appropriate to determine the custody placement of enrolled members of the Blackfeet Indian Tribe who are residing on the Blackfeet Indian Reservation." It further ordered that the minor children were not allowed to "leave the exterior boundaries of the Blackfeet Indian Reservation pending litigation of this jurisdiction issue." At the July 28, 1986, hearing in the Boulder County District Court, the Court ignored the Blackfeet Tribal Court Order because "the jurisdictional issue has been litigated." However, the District Court never determined the more appropriate forum as between the Colorado court and the Blackfeet Tribal Court, and thus only the jurisdictional issue as between the Montana and Colorado courts was litigated.

The Colorado Court of Appeals found that because the Blackfeet Tribal Court failed to contact the Colorado court, it did not act in substantial conformity with the

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[2] The facts of this case provide adequate grounds for the Colorado court to determine that the Tribal Court was the more appropriate forum. The marriage was begun on the Reservation. The mother was a lifelong resident of the Reservation except for time away to attend school. The father was a resident of the Reservation until he left with Petitioner for school purposes. The children had been in Colorado only six months prior to the time the Colorado court proceeding was filed.

UCCJA, and thus the Court found no error in the District Court's refusal to recognize the Blackfeet emergency protective order. Appendix G-15. However, the District Court also had the responsibility to contact the Tribal Court pursuant to C.R.S. 14-13-107(2) once it learned of the Blackfeet Tribal Court order to inform the Tribal Court of the Colorado proceeding "to the end that the issues may be litigated in the more appropriate forum." *Id.*

Clearly, the Colorado court did not treat the Tribal Court in the same manner it would treat another state court under the UCCJA. The Colorado court failed to comply with the requirements of the UCCJA and principles of comity when it failed to contact the Tribal Court. This Court ought to grant certiorari to clarify the status of the Blackfeet Tribal Court as a state or its equivalent under the UCCJA, and the duties and responsibilities of the Colorado courts vis-a-vis the Blackfeet Tribal Court under the Act.

2. Tribal Law Provides for Tribal Court Jurisdiction in This Case

The Court of Appeals held that tribal court jurisdiction need not be considered because "[b]y express terms of the Blackfeet Code, the state court was given jurisdiction over divorce and custody matters," citing *United States ex rel. Cobell v. Cobell,* 503 F.2d 790 (9th Cir. 1974). Appendix G-15. The tribal law relied on by the Court, however, was amended in December 1974, and thus the Court looked to the wrong law!

By Ordinance dated December 13, 1974, the Blackfeet Law and Order Code was amended to delete all references

to concurrent jurisdiction and any grant of jurisdiction to the State of Montana. *See* Preface to Blackfeet Law and Order Code reprinted *supra* at 6. Thus, at least since December, 1974, the Blackfeet Tribe has regularly exercised jurisdiction over divorces and custody matters involving tribal members.

Where conflicts between state and tribal courts are involved, special considerations, in addition to traditional UCCJA considerations, come into play. As the Montana Supreme Court stated in *Application of Bertelsen,* 617 P.2d 121, 128 (Mont. 1980):

> Although presence and domicile are handy jurisdictional rules, these tests largely ignore the ethnic identity of the child and cultural ties to the tribe.
>
> * * *
>
> An assumption of state court jurisdiction over Indian child custody disputes poses a substantial risk of conflicting decisions which potentially threaten a decline in tribal authority. Different cultural views of parental responsibility are likely to be reflected by the ultimate custody determinations of tribal and state courts. To assume jurisdiction based solely on the location of the child or his parents or of various activities is to ignore the importance of ethnic heritage and customs. Presumably the tribal court is better equipped to consider the ethnic identity as a factor in determining the child's welfare than is a state court. . .
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> * * *
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> We conclude that to properly consider tribal interests in child custody that go beyond reservation boundaries, the best means to arrive at a considered decision as to whether a state court should accept or decline jurisdiction is to balance the state interests

> in taking jurisdiction against the tribal interest in assuming jurisdiction. The state may assert jurisdiction in an Indian child custody dispute of this sort if, upon balance, it appears that the state's contacts with and interest in the child and the parties are more substantial than those of the tribe.
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> . . . . the trial court must inquire into the contacts of the child, and the parties to the state and to the tribe. It should consider the tribe's interest in deciding the custody of one of its members and must record such inquiries of fact and make appropriate conclusions of law directed at the question of which forum is better suited to determine the child's welfare.

Although *Bertelsen* did not involve application of the UCCJA, it does articulate the kind of inquiry a court should make under the Act.

This is exactly the kind of inquiry the Boulder County District Court should have made either under the UCCJA or as a matter of comity. However, the Colorado court apparently believed that the Blackfeet Tribe had transferred its jurisdiction to State Court. Because the Blackfeet Tribal Court has regularly exercised child custody jusisdiction at least since 1974, this court should grant certiorari and remand to the Colorado courts for application of the correct tribal law.[3]

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[3] Ordinarily, interpretation of tribal laws is a matter which should be undertaken in the first instance by the tribal court. *See* National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845 (1985); Iowa Mutual Ins. Co. v. LaPlante, 107 S. Ct. 971 (1987). Thus, at a minimum, the Colorado court ought to allow the Tribal Court to determine whether it has jurisdiction, and if so, to then confer with the Tribal Court to determine the more appropriate forum based on factors such as those articulated in *Application of Bertelsen, supra,* and in the UCCJA itself.

CONCLUSION

For the reasons stated above, the Petition for Certiorari should be granted.

Respectfully submitted,

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